Document 2.1

COMMONWEALTH OMBUDSMAN

Our ref: 2021-104592
PID ref: PID-2020-400006

15 December 2022

Australian Public Service Commission
by email: PID@apsc.gov.au

Dear Australian Public Service Commission

Finalisation of investigation of a complaint about the APSC's handling of a disclosure

Thank you for the Australian Public Service Commission's (APSC) assistance with our investigation of a complaint about its handling of a disclosure under the *Public Interest Disclosure Act 2013* (PID Act) concerning recruitment practices of the Federal Court of Australia (Federal Court).

Our investigation is now finalised, and we consider it appropriate to provide comments and suggestions to the APSC under s 12(4) of the *Ombudsman Act 1976*.

Background

The complainant complained to our Office about the adequacy of the APSC's investigation of the disclosure and the 9 December 2020 investigation report prepared under s 51 of the PID Act. The public interest disclosure (PID) raised concerns about merit selection processes at the Federal Court s 47E

The PID was investigated by acting Assistant Commissioner Kate McMullan. In this letter we refer to Ms McMullan as the Investigator.

Our investigation focused on whether:

- there were deficiencies in the PID investigation process, including the investigation report
- the report findings were, in the circumstances, open to the investigator to make
- further steps are required to address any deficiencies in the PID investigation and report and/or improve the APSC's handling of PIDs in future.

Investigation findings

Broadly, it is our view that:

- s47E
- [redacted]

- the APSC should take steps to improve its handling of similar matters in future s47E [redacted]

Comments

s47E [redacted]. Each of these topics is discussed below.

1. **Record keeping**

s47E [redacted]

Additionally, as our Agency Guide to the PID Act (the Agency Guide) notes, "the formality of the investigation should be commensurate with the seriousness and nature of the alleged disclosable conduct and the importance of the evidence. The investigator's records should contain sufficient detail appropriate to the nature of the investigation." s47E [redacted]

s47E [redacted]

We acknowledge the APSC's advice that, since April 2022, all new PID matters are recorded in its new Matter Management System called LEX. As we understand it, this system should improve the APSC's ability to track and maintain records of disclosures made to the agency and investigations it undertakes.

2. PID Investigation

What steps are required for a PID to be properly or adequately investigated, and thereby meet one of the principal objects of the PID Act, will largely depend on the nature of the PID. This is because, apart from a few specific requirements,[1] a PID investigation is conducted as the relevant officer sees fit.

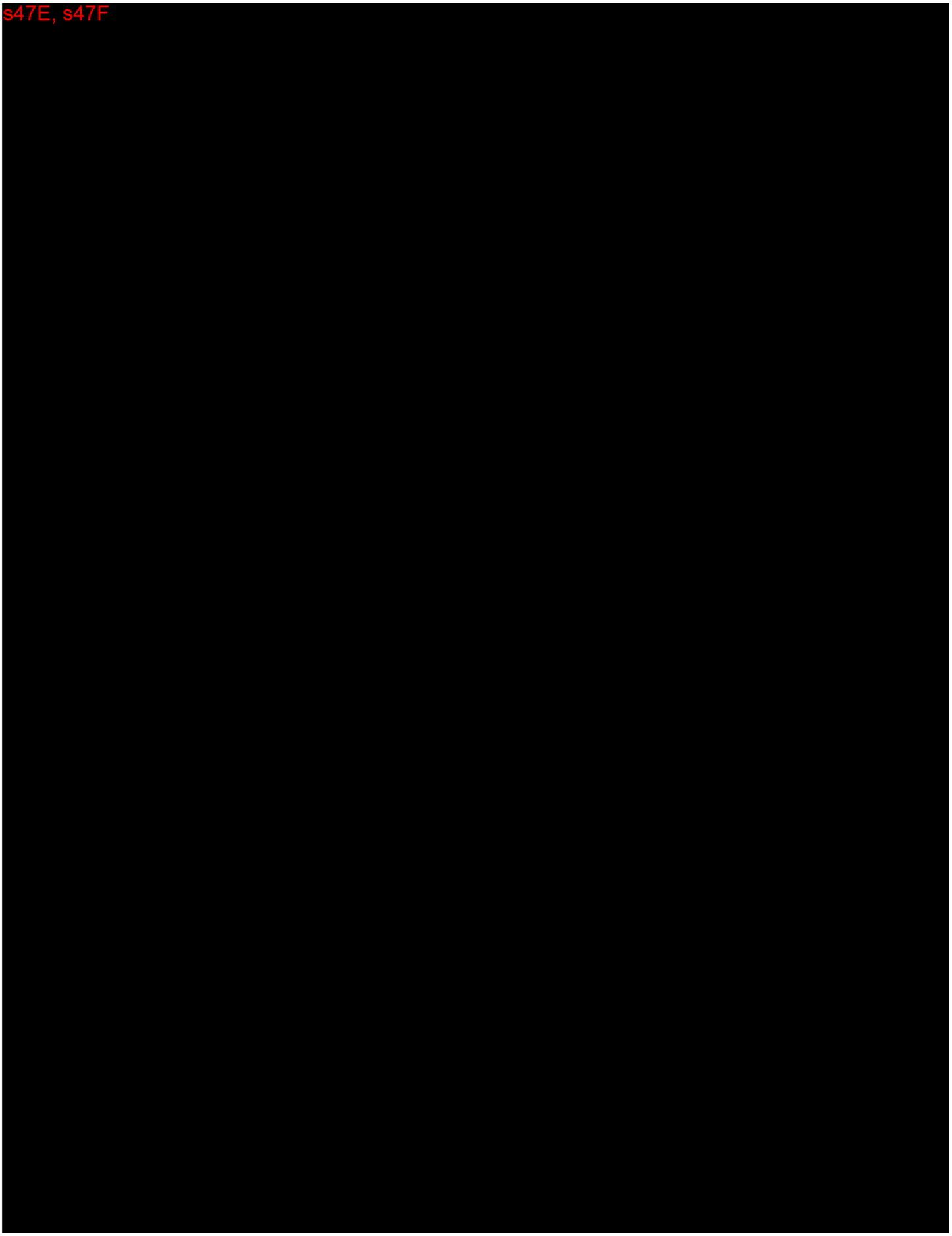
Our Agency Guide, at 2.7.7.1, contains a list of reasons why an investigation may be considered inadequate. There is necessarily some subjectivity involved in assessing whether a PID investigation was adequate. In cases where there are fewer, or more minor deficiencies identified, we may not consider the deficiencies sufficient to conclude the investigation was not adequate.

s 47E [redacted]

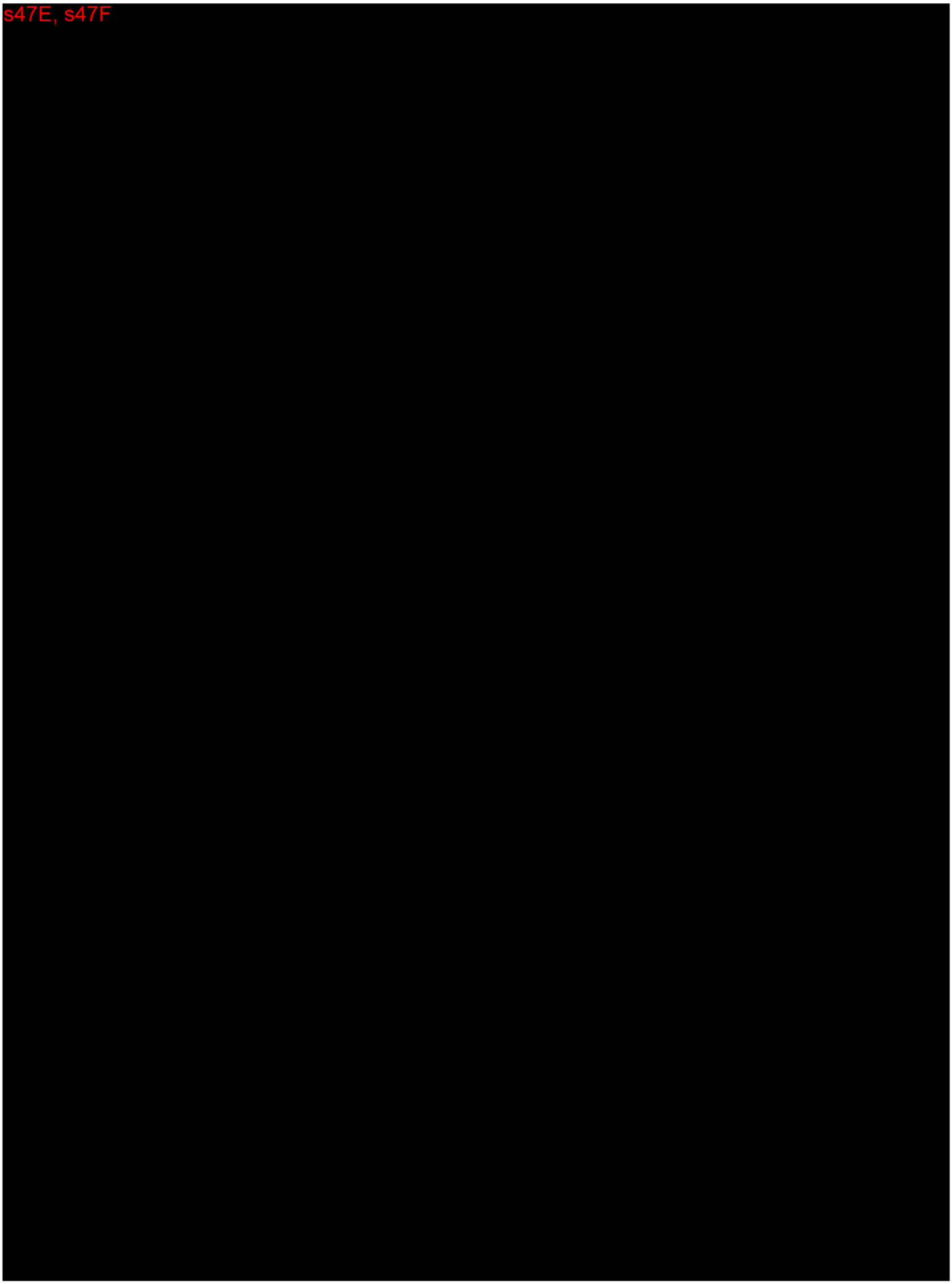
s47E [redacted]

[1] Specific requirements including: 1. procedural requirements when investigating a possible breach of the APS Code of Conduct or Parliamentary Service, 2. standard of proof is the balance of probabilities, 3. any evidence relied on is relevant (per the PID Standard).

s47E, s47F



s47E, s47F



s47E, s47F

[redacted]

s47E [redacted]

3. **PID Report**

s47E [redacted], a s 51 report should include an adequate summary of the content of the evidence on which any findings and recommendations are based. This assists a discloser to understand the rationale for an agency's conclusions and assists any third parties reading the report (including our Office when assessing a complaint about an agency's handling of a PID) to follow the agency's reasoning, assess the adequacy of the investigation undertaken and whether the conclusions are open to make and are supported by the available evidence.

s47E [redacted]

Suggestions

s47E [redacted] we suggest the APSC:

1. s 47E [redacted] making some additions to the APSC's investigative procedures, s 47E [redacted] and other guidance material for APSC Investigators s 47E [redacted]
2. Review its records management frameworks and systems s 47E [redacted]

s 47E [redacted]

I would be grateful if the APSC would provide a response to the comments and suggestions we have made by **20 January 2023.**

While we have decided to finalise this investigation, you should be aware that we offer the complainant an opportunity to seek an internal review of this decision. Should this occur and we reach a different conclusion about this complaint, we may contact you again.

If you have any questions or require any further information, please contact me on s47F [redacted] or by email to: s 47F [redacted] @ombudsman.gov.au.

Yours sincerely

Carmen s 47F [redacted] (*by electronic signature*)
Director
Public Interest Disclosure Team
Office of the Commonwealth Ombudsman
Influencing systemic improvement in public administration